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9 Attorneys for Defendant, Marco Antonio Topete

11 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 IN AND FOR THE COUNTY OF YOLO

14 THE PEOPLE OF THE STATE OF
15 CALIFORNIA,

16 Plaintiff,

17 and

18 MARCO ANTONIO TOPETE

19 Defendant.

Case No. CRF08-3355

POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR
CHANGE OF VENUE

Date: May 21, 2010

Time: 8:30 a.m.

Dept: 6

21 Defendant submits the following Points and Authorities in support of
22 the Motion for Change of Venue:
23
24
25

FILED
YOLO SUPERIOR COURT

APR 09 2010

By

C. Garrett
Deputy

1 I

2 A SUPERIOR COURT MUST ORDER A CRIMINAL ACTION PENDING
3 BEFORE IT TRANSFERRED TO ANOTHER COUNTY IF THERE IS A
4 REASONABLE LIKELIHOOD THAT THE DEFENDANT CANNOT RECEIVE
5 A FAIR AND IMPARTIAL TRIAL IN THE COUNTY WHERE THE CHARGES
6 HAVE BEEN FILED.

7 Penal Code Section 1033 provides:

8 In a criminal action pending in the Superior Court, the court shall
9 order a change of venue:

10 (a) On motion of the defendant, to another county when it appears
11 that there is a reasonable likelihood that a fair and impartial trial
12 cannot be had in the county

13 II

14 A DEFENDANT NEED NOT ESTABLISH THE LIKELIHOOD OF
15 PREJUDICE BY A PREPONDERANCE OF THE EVIDENCE.

16 In Frazier vs. Superior Court, 5 Cal.3d 287, 294-295, 95 Cal.Rptr.
17 798, 486 P.2d 694, [1971] the Supreme Court held:

18 "Reasonable likelihood "of prejudice does not mean that prejudice
19 must be "more probable than not"; . . .

20 A defendant is entitled [to a change of venue] "not only when a
21 preponderance of circumstances calls for such a result, but also when a
22 defendant has shown even a 'reasonable likelihood' that he will not receive
23 a fair trial."

24 Stated another way, "the phrase 'reasonable likelihood' means
25 something less than 'more probable than not,' and something more than

1 'possible.'" [People vs. Procter, 4 Cal.4th 523, 15 Cal.Rptr. 340, 842 P.2nd
2 1100 [1992].

3 4 ARGUMENT

5 At the time of his death, the victim in this case, Antonio Diaz, was
6 serving as a Yolo County Deputy Sheriff on patrol duty. He had worked
7 with the Yolo County Sheriff's Office for ten (10) years and had served as a
8 sworn deputy for the last four (4) years of that period. The defendant, on
9 June 15, 2008, was an unemployed California State Prison Parolee who had
10 been absent from Yolo County, where he was raised, for ten (10) years
11 prior to March, 2007.

12 The defendant faces a jury trial in the Yolo County Courthouse staffed
13 by Yolo County Deputy Sheriff's. If normal routine prevails, Yolo County
14 Deputy Sheriffs' will serve as bailiffs and added security in the courtroom.
15 The defendant is, therefore, to be judged by jurors surrounded by friends
16 and fellow officers of the victim and those jurors will be asked to fairly and
17 impartially judge the question of the defendant's guilt or innocence, or life
18 or death, and to do so in the presence of the victim's co-workers and
19 friends. The deputies' presence can create unfair pressure on the jury to
20 the potential detriment of the defendant. The official character of a bailiff,
21 as an officer of the court as well as the state, beyond question carries great
22 weight with the jury. Parker vs. Gladden [1966] 385 U.S. 363, 365, 87
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1 S.Ct. 468, 470, 17 L.ED.2d 420; People vs. Hedgecock [1990], 51 Cal.3d
2 395, 275 Cal.Rptr. 803.

3 It would seem difficult to deny that any juror inclined to find for the
4 defendant on any issue, including life or death, might hesitate to do so in
5 the presence of a bailiff or bailiffs and security officers who have been in
6 the courtroom for weeks of trial and are known to the jurors to have been
7 friends and fellow officers of Anthony Diaz in a department of only sixty
8 (60) sworn officers.

10 CONCLUSION

11 It is respectfully submitted that, in light of the foregoing, there exists
12 a reasonable likelihood that the defendant would not receive a fair and
13 impartial trial under present circumstances and that his request for a
14 change of venue to another county where the courtroom would not be
15 staffed by fellow workers and friends of Antonio Diaz should be granted.

17 When the issue of venue is raised before trial, any doubt as to the
18 necessity of removal to another county should be resolved in favor of a
19 venue change. Martinez vs. Superior Court (1981), 29 Cal.3d 574, 578,
20 174 Cal.Rptr. 701, 69 P.2nd 502; Powell vs. Superior Court, 232 Cal.App.3d
21 785, 283 Cal.Rptr. 777.

23 Respectfully submitted,

24 Dated: 4/9/10

25 By: _____

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Attorney for Marco Antonio Topete